No. 21

In the Supreme Court of the United States

OCTOBER TERM, 1942

WARREN-BRADSHAW DRILLING COMPANY,
PETITIONER

v.

O. V. HALL, INDIVIDUALLY AND AS AGENT OF
W. N. SLAID, ET AL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

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The Solicitor General submits this brief on behalf of the Administrator of the Wage and Hour Division, United States Department of Labor, as *amicus curiae*.

OPINIONS BELOW

The opinion of the District Court (R. 138–141) is reported in 40 F. Supp. 272. The opinion of the Circuit Court of Appeals (R. 157–162) is reported in 124 F. (2d) 42.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 9, 1941 (R. 162). The petition for writ of certiorari was filed January 19, 1942, and granted June 8, 1942 (R. 164). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether respondents were proved to be engaged in "the production of goods for commerce" within the meaning of Section 7 (a) of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act appear in the Appendix, *infra*, p. 23.

STATEMENT

On February 3, 1941, respondents filed a complaint against petitioners pursuant to Section 16 (b) of the Act, alleging that while employed by petitioner they had been engaged in the production of oil for commerce but had not been paid overtime compensation in accordance with the requirements of Section 7, although demand had been made for such compensation (R. 1–5). Petitioner's answer disputed the applicability of the Act to respondents' employment and denied violations of the statute (R. 6–7). The pertinent

evidence adduced at the trial may be summarized as follows: Petitioner is the owner and operator of rotary drilling equipment and machinery. Under contract with the owners or lessees of oil lands (R. 6, 22–29), it undertakes to drill holes to a depth short of the oil sand stratum. As a hole is drilled, casing is inserted. When an agreed-upon depth is attained, the casing is cemented, the drill pipe removed, the rigging dismantled, and the machinery and rotary drilling crew are dispatched to other locations (R. 35–37, 39, 42, 57). When the rotary drilling equipment is removed, a "cable crew" undertakes to "bring in" or "shoot" the well with cable tools and to demonstrate whether or not it is a dry hole (R. 38–39, 49). Respondents, who were employed by petitioner as members of his rotary drilling crews, worked on approximately thirty-two wells (R. 91) in the Panhandle Oil Field of Texas. Thirty-one of these wells produced oil (R. 75, 78, 79) and one produced gas (R. 78). Petitioner was not owner or lessee of any of the lands on which respondents worked and appeared to have no interest therein or in the oil produced therefrom.

The wells had pipe-line connections (R. 79, 83, 85), many of them being with petroleum companies operating on a national scale (R. 14–22, 85); "any of these pipe lines" transports oil out of Texas (R. 80). A large portion of

crude oil which goes to refineries in Texas thereafter passes out of the State in the form of refined products (R. 81, 82, 84, 105–106, 109–110).

Respondents were employed on the basis of an eight-hour day, and received fixed salaries of $6.50 to $11 per day; they regularly worked seven days a week (R. 31–32, 46–47, 49, 53, 57–58; 59, 61, 65, 70–71). There was no agreement providing for an hourly rate of pay or that the weekly salary included extra compensation for overtime hours (*ibid.*; R. 161).

The District Court held that respondents were engaged in the production of oil for commerce and had not been compensated for overtime hours in accordance with Section 7 of the Act (R. 138–141). The court entered judgment for each plaintiff in the amount of unpaid compensation found to be due him and for an equal additional amount as liquidated damages (R. 141–143). The Circuit Court of Appeals affirmed the judgment (R. 157–162).

ARGUMENT

RESPONDENTS WERE ENGAGED IN THE PRODUCTION OF GOODS FOR INTERSTATE COMMERCE AND WERE WITHIN THE COVERAGE OF THE FAIR LABOR STANDARDS ACT

The Government does not discuss, in this brief, whether the compensation paid respondents by petitioner satisfies the overtime requirements of Section 7 of the Act. This question appears to have been authoritatively settled by this Court in

Overnight Motor Transportation Co. v. *Missel*, No. 939, last Term, decided June 8, 1942, petition for rehearing pending. The argument herein is addressed to the question whether in the performance of services for petitioner as their employer, respondents were engaged in the production of goods for commerce.

Section 7 of the Act provides that "no employer shall * * * employ any of his employees who is engaged in commerce or in the production of goods for commerce" for more than a specified number of hours per week, unless "time and a half" is paid for the extra hours. Section 3 (j) reads as follows:

> "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

It is evident that the application of the Act to respondents turns upon whether they were "engaged * * * in the production of goods for commerce" (Sec. 7). This determination, in turn, rests upon whether they were engaged in any of the activities enumerated in Section 3 (j), including "any process or occupation neces-

sary to the production * * *." The statute does not purport to define "produced" or production" beyond the language of Section 3 (j), or to indicate what processes are "necessary to the production," nor has the Congress provided for a preliminary administrative proceeding to assist the courts in ascertaining whether the particular situation is in the regulated area; that question is left to be determined by the courts upon the facts of individual cases as they arise. *Kirschbaum* v. *Walling,* No. 910, last Term, decided June 1, 1942.

It appears from a reading of Sections 7 and 3 (j) that it was the congressional purpose that the application of the overtime pay provisions of the Act should be determined, by reference not to the nature of the employer's enterprise, but rather to the character of the activities of his employees. This construction has been settled by this Court in *Kirschbaum* v. *Walling, supra.* It was the respondents' burden, therefore, to demonstrate that in the course of performing their services for the petitioner and without regard to the nature of his business, they were, as his employees, engaged in the production of goods, and that such production was for interstate commerce.

A. RESPONDENTS WERE ENGAGED IN THE PRODUCTION OF OIL OR IN A PROCESS NECESSARY TO PRODUCTION WITHIN THE MEANING OF SECTION 3 (j)

There is no known method for the commercial production of oil which does not include piercing

the surface of the earth and holing down to the oil level or horizon. There are two modern methods used for the production of oil, namely, the "cable tool method" which employs the principle of percussion and the "rotary drilling method" which employs the principle of boring. It has been estimated that 60 percent of the well-digging rigs in the United States are of the rotary drilling variety,[1] such as were set up, operated, dismantled, and then removed to other oil lands by respondents while they were in the employ of petitioner.

To attempt to demonstrate that drilling is necessary to oil production would be to elaborate the obvious. The Administrator takes the position, generally, fortified by judicial opinion, that indispensability to production is not a condition of coverage, but if it were, he would be justified in saying that drilling is a process or activity indispensable in the production of oil. The direct and intimate relationship of drilling to the actual extraction of oil from the substratum warrants the conclusion that it is not only indispensable to the production of oil but, indeed, *is an integral part of the productive process.*

In the Fair Labor Standards Act Congress was concerned with the assurance that the "production" of goods passing in commerce met certain modest labor standards. *United States* v. *Darby,* 312 U. S. 100, 113–115. To obtain the widest possible achievement of that purpose, Con-

[1] Leven, *Done in Oil* (1941), p. 38.

gress defined "produced" in the most sweeping terms (Sec. 3 (j)). Thus, an employee is deemed to have been engaged in the production of goods if he was employed in "*producing*, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof * * *. [Italics supplied.] These are not words of limitation: they evidence an intention, rather, to encompass a broad field of economic activity which results in "goods" entering the channels of interstate commerce. Thus, one who is engaged by a coal mining company to assist in digging a shaft is engaged in "mining" within the meaning of Section 3 (j), although he may never come into contact with the "goods" which are ultimately extracted and then placed in the channels of interstate commerce. Similarly, it is plain that respondents who drilled to a prescribed depth by means of a rotary rig and then dismantled the rig, removed it, and left to a cable tool crew the work of "bringing in" the oil well were engaged or employed in the "production" of oil, although they never came into contact with the "goods."[2]

[2] It has been well established that participation in the physical process of making goods is not required by the phrase "engaged in producing" goods, *Kirschbaum* v. *Walling*, 62 Sup. Ct. 1116, 1120; and that an employee to be entitled to the benefits of the Fair Labor Standards Act need not come "in actual, physical contact with the goods produced." *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. (2d) 655, 657 (C. C. A. 10).

Respondents, it is true, may never have seen the oil with the production of which, in part, they credit themselves. The service they performed, nevertheless, was so closely related to production to warrant considering it a part thereof. Oil companies engaged in the production of petroleum either maintain their own rotary drilling crews or contract the job out to a specialist who goes from site to site with his crews and machinery drilling wells for the owners or lessees of oil lands.[3] It would seem that a contractor operating under such conditions and circumstances performs a mechanical service which is a part of the economic function of the oil industry, namely, the production of oil.

It is not here contended by the Administrator that the "production of oil" comprehends every conceivable operation and process leading up to the extraction of oil from the ground, including

[3] "The major oil companies, as a rule, prefer to do their own oil well drilling, and are usually well equipped for such operations in most of the active fields. * * * On the other hand, many of the big oil companies also recognize the advantage of letting out large parts of their drilling operations under contract to regular well-drilling contractors who specialize in such work. * * * Many oil companies, especially the smaller ones, prefer to have their drilling or the greater part of it done by regular independent well-drilling contractors. This method has many advantages, not only for small companies but for the larger ones as well, because such contractors generally specialize in certain types of drilling or concentrate upon specific fields, and thus become especially expert and familiar with such types of fields." Leven, *Done in Oil* (1941), pp. 371–372.

the financing of the corporation, leasing the oil lands, prospecting, building sheds, storehouses, derricks, tanks, etc.[4] It is sufficient that drilling to a prescribed depth below the earth's surface just short of reaching the reservoir of oil is an operation that appears to be an integral part of the complex of processes which constitute production in the oil industry.[5]

In *Kirschbaum* v. *Walling*, No. 910, last Term, decided June 1, 1942, this Court had occasion to

[4] "The production branch of the American petroleum industry falls logically into two principal parts, that relating to exploration for, and development of, oil fields, and production proper, the secondary process which is concerned with the actual and continuing extraction of the product to the point of economic exhaustion of the possibilities. It is entirely possible to be in the 'production division' of the business and never send out a land scout, drill a well, or hire a geophysicist." Shuman, *The Petroleum Industry, An Economic Survey*, University of Okla. Press (1940) p. 29. The Government does not urge upon this Court as general a conception of production as that which is current in the industry, but suggests that well-drilling, at least, is embraced by that term.

[5] This position was given forceful expression by Judge Hutcheson in the opinion of the Court of Appeals below in the following language: "In the practical operation of the oil business, no one would accept the view that rotary drilling is not *a part of the production of oil* and that rotary drilling crews are not a part of the field forces actually engaged in its production. Only by the sheerest quibbling could they be excluded from the operation of laws covering such field forces. * * * appellant and its employees are engaged generally in mining for and the production of oil in this state * * *." [Italics supplied.] (R. 160, 161, 124 F. (2d) 42, 44.)

give full consideration to the degree of relationship to production which would justify consideration of a process or occupation as "necessary" thereto. It was stated that the work of employees in that case (loft maintenance employees) "had such a close and immediate tie with the process of production for commerce, and was therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce'." The only material distinction between the *Kirschbaum* case and the instant case, insofar as the relation of the work to production is concerned, is that in the *Kirschbaum* case the work was of a maintenance character, coincidental in point of time with the productive process which might well have preceded the performance of the services and have continued when the services ceased. In the instant case, however, the close relation of the drilling to the extraction and movement of oil and its physical proximity warrant the conclusion that respondents were engaged in a process or occupation necessary to production.

The legislative history of Section 3 (j) makes it evident that wherever the line was intended to be drawn separating those processes and occupations necessary and those not necessary to production, the activities of respondents fall on

the side of coverage.[6] Certainly, the present language of Section 3 (j) represents a very considerable extension and liberalization of coverage over that contained in the earlier drafts. It was decided, evidently, that it was more desirable for the courts to mark out the area of what was necessary for production than to prescribe an inflexible rule in the formulation of which special cases could not be foreseen or taken into account. If it was originally intended that those making tools and dies used in production should be considered employed in the production of goods, it would seem to follow that those utilizing the tools in the actual process of production are well within the congressional purpose. Further, the apparent intent of Congress to include activities of tool and die workers within the last clause of Section 3 (j) demonstrates that it considered the Act applicable to employees performing activities *preparatory* to production provided those activities had a sufficiently "close and immediate tie with the process of production." *Kirschbaum* v. *Walling, supra,* p. 1121.

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[6] In earlier drafts of the bill introduced in the Senate, the clause "or in any process or occupation necessary to the production thereof, in any State" did not appear; instead there appeared a very specific clause: "or in the making of tools and dies used in the production of such goods in any State." S. 2475, 75th Cong., 1st sess., May 24, 1937, Sec. 2 (a) (24). The corresponding provision of the bill introduced in the House was identical except that it did not contain the phrase "in any State." H. R. 7200, 75th Cong., 1st sess., May 24, 1937, Sec. 2 (a) (24).

B. RESPONDENTS WERE ENGAGED IN MINING WITHIN THE MEANING OF SECTION 3 (j).

Respondents are within the coverage of the Act if they produced goods for commerce (Sec. 7 (a)) and for the purposes of the Act employees are deemed to have produced goods if they were employed in "mining" such goods (Sec. 3 (j)).

The legislative history of Section 3 (j) is silent as to the scope intended to be ascribed by Congress to the term "mining." For purposes other than the Fair Labor Standards Act it might be contended, perhaps, that the term should be limited to processes employed in the extraction of gold, coal, silver, and similar inorganic minerals. The Administrator submits, however, that for the purposes of the Act there are strong considerations which conduce to a broader interpretation of the term to include drilling for the extraction of oil from the earth.

It is doubtful that the term "mining" was intended to be used as a "word of art" (*United States* v. *American Trucking Assns.*, 310 U. S. 534, 545) and it may properly be viewed as taking color from its surroundings and having such significance as might be reasonable considering the purpose of the statute in which it is found. *United States* v. *American Trucking Assns., supra; South Chicago Co.* v. *Bassett*, 309 U. S. 251; *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50. It is recognized that judicial precedents that oil production constitutes mining

should not be determinative of the issue whether it constitutes mining within the meaning of Section 3 (j). They are entitled to weight, however, and justify a conclusion consistent with the position taken by the Administrator.

This Court has held in *Burke* v. *Southern Pacific R. R. Co.*, 234 U. S. 669, 676, 677, 679, that a grant under a statute excluding "all mineral lands" other than coal or iron lands did not convey oil lands. It was there held that oil was a mineral.[1]

In common parlance the extraction of minerals from the earth is referred to as mining. The dictionary definition of the noun "mine" recognizes its application to the extraction of minerals other than ores, precious stones, or coal.[2] Recog-

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[1] See also *United States* v. *Southern Pac. Co.*, 251 U. S. 1; *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190, 202; *Crain* v. *Pure Oil Co.*, 25 F. (2d) 824, 826 (C. C. A. 8); In re *Great Western Petroleum Corp.*, 16 F. Supp. 247 (S. D. Calif.); *Funk* v. *Haldeman*, 53 Pa. St. 229 (1867); *Gill* v. *Weston*, 110 Pa. St. 312, 317 (1885); *Williamson* v. *Jones*, 39 W. Va. 231, 256 (1894); *Kelly* v. *Ohio Oil Co.*, 57 Ohio St. 317, 328 (1897); *Murray* v. *Allred*, 100 Tenn. 100 (1897); *Wagner* v. *Mallory*, 169 N. Y. 501, 505 (1902); *Cornwell* v. *Buck & Stoddard*, 28 Calif. App. (2d) 333 (1938); *Westmoreland & Cambria Natural Gas Co.* v. *De Witt*, 130 Pa. St. 235 (1889); *Isom* v. *Rex Crude Oil Co.*, 147 Calif. 659 (1905).

Oil has been described by Congress at various times as a mineral. 15 Stat. 58, 59, c. 41, sec. 1; 15 Stat. 125, 167, c. 186, sec. 109; 29 Stat. 526, c. 216; 32 Stat. 691, 702, c. 1369, sec. 42; 36 Stat. 847, c. 421, sec. 2.

[2] "Mine * * * 1. a. A pit or excavation in the earth, from which ores, precious stones, coal, *or other mineral substances* are taken by digging *or by any of various other min-*

nition of oil well drilling as a mining operation and of petroleum as a mineral obtained by mining processes is also found in the fact that study, analysis, and research with respect to the petroleum industry are conducted, and the statistics thereof are collected, by the Bureau of Mines of the Department of Interior.[9] Moreover, it is significant that the Bureau of Census of the Department of Commerce classifies petroleum wells as mines.[10]

This Court seems not to have been called upon to go beyond its holding that petroleum is a mineral and to decide that the process of extracting it from the earth is "mining."[11] In *Shell Pe-*

ing methods; * * *." [Italics supplied.] Webster's New International Dictionary, unabridged (2d ed. 1939).

[9] Minerals Yearbook Review of 1940; U. S. Dept. Int., Bureau of Mines, *Crude Petroleum and Petroleum Products*, pp. 933–1027. It is interesting to note that the act appropriating funds to the Department of Interior, Bureau of Mines for the fiscal year ending June 30, 1943, appropriates out of the Treasury funds "To conduct inquiries and scientific and technologic investigations concerning the *mining*, preparation, treatment, and use of mineral fuels * * * belonging to or for the use of the United States * * *" (Pub. No. 645, 77th Cong., 2d sess., sec. 1, p. 39). [Italics supplied.]

[10] The Bureau of the Census, Statistical Abstract of the United States, 1941, in Table No. 792, p. 803, under a column designated "Number of mines and quarries" shows 340,990 petroleum "mines." See also Table No. 796, pp. 806, 808, in which petroleum is classified as a mineral product.

[11] In *Champlin Refining Co.* v. *Corporation Comm. of Oklahoma*, 286 U. S. 210, in connection with a discussion of whether the proration orders of the commission were in con-

troleum Corp. v. *Candle*, 63 F. (2d) 296 (C. C. A. 5),[12] however, the Circuit Court of Appeals said (p. 297): "Oil production from the earth is to be classed as mining."[13]

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flict with the commerce clause of the Federal constitution, it was said at p. 235: "* * * It is clear that the regulations prescribed and authorized by the Act and the proration established by the commission apply only to production and not to sales or transportation of crude oil or its products. *Such production is essentially a mining operation.* * * *." [Italics supplied.] In *United States* v. *Southern Pac. Co.*, 251 U. S. 1, 11–14, Mr. Justice Van Devanter consistently referred to the process of petroleum extraction as "oil mining."

[12] This was a suit for labor, rental of oil well casing, and the value of casings retained. The case turned on the point of what constituted a "mining partnership."

[13] A similar result was reached in In re *Great Western Petroleum Corp.*, 16 F. Supp. 247 (S. D. Calif.), which involved a California statute requiring conditional sales contracts with respect to "equipment and machinery used for mining purposes" to be recorded. The question was whether particular contracts, unrecorded, were binding upon a trustee in bankruptcy. It was said at pp. 249-250: "The discovery of petroleum has led to a change in terminology. Persons engaged in the industry, geologists and courts generally began to consider oil as a 'mineral' and the process of extracting oil from the ground as 'mining.' Such they are considered at the present time. [Citing cases.] * * * But oil is *now* so generally considered a mineral and the extraction of oil is *now* so generally considered as mining, that we must assume that the California Legislature of 1933, in using the word 'mining' in the section, used it in the sense in which that word had come to be used *at that time* and not in the sense in which a similar word might have been used by the California Legislature of 1872." Accord (by same district judge) *United States* v. *Standard Oil Co. of California*, 21 F. Supp. 645, 662 (S. D. Calif.); *Gill* v. *Weston*,

It is suggested that these precedents give weight to the conclusion that in drilling the oil well with rotary machinery to a depth just short of the oil sands, respondents were employed in a process that might reasonably be described as mining.

The Government does not pretend that the significance of "mining" in Section 3 (j) is entirely free from doubt, but contends that a reasonable construction of the provision, appearing, as it does, in a remedial statute,[11] justifies an interpretation of the term which includes respondents' activities. Surely, one who is engaged by a coal mining company to assist in digging a vertical shaft, but who is discharged before the vein of coal is reached, was, during the period of his employment, engaged in the performance of "mining" services. Such an individual performs the same industrial function as that performed by respondents, namely, piercing the earth by drilling, digging, boring, or otherwise excavating, in order to achieve a passageway for the removal of minerals captured in a substratum. The accidental fact that the extraction of coal requires a larger passageway than oil and that different tools and machinery are employed cannot affect the identity of the functions performed so long as the

110 Pa. St. 312, 317 (1885); *Funk* v. *Haldeman*, 53 Pa. St. 229 (1867). But cf. *Cornwell* v. *Buck & Stoddard*, 28 Calif. App. (2d) 333 (1938).

[11] *Fleming* v. *Hawkeye Pearl Button Co.*, 113 F. (2d) 52 (C. C. A. 8).

excavating takes place for the purpose of extracting a mineral.

By associating "producing" in Section 3 (j) with words of broad and general intendment such as "manufacturing, mining, handling, transporting," Congress apparently intended to encompass all industrial functions and operations having a close and immediate tie with the processes of production for commerce. No particular or specific operation is singled out for mention. Congress saw fit to deal only in the broadest and most general concepts. This consideration lends weight to the view that "mining" was not conceived of as a limited operation or in a highly technical sense. It is our position that Congress attempted an enumeration of general industry groups rather than operations, namely, the producing, manufacturing, mining, handling, and transporting industries. Each such industry group includes many operations and requires the performance of services which, under technical dictionary definition, might not come within the term by which it is identified. The congressional purpose, however, to establish labor standards applicable to the rate clerk, checker or inspector in the transporting industry who does not actually transport as well as to the driver who operates the truck can not be denied. *Overnight Motor Transportation Co.* v. *Missel, supra.* Similar, that purpose would appear to extend to the individual who

drills an oil well by rotary process to a point short of the oil level as well as to the individual who then takes over and "brings in" the oil by means of cable tools. They are both engaged in the process of mining to the same extent as one who digs a shaft for the production of coal.

C. RESPONDENTS WERE ENGAGED IN PRODUCTION FOR COMMERCE NOTWITHSTANDING PETITIONER'S LACK OF FINANCIAL INTEREST IN THE OIL PRODUCED OR ACTUAL KNOWLEDGE OF ITS DISPOSITION

The Government makes no claim that the application of the Act to petitioner can rest upon the expectation of the well owner, rather than of petitioner, concerning the movement of the oil in interstate commerce. The criterion of application was expressed by this Court in *United States* v. *Darby*, 312 U. S. 100, and it is clear that the "production for commerce" intended by Congress includes—

> * * * production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce (p. 118).

Petitioner disavows any intention or expectation with respect to the disposition of the oil to the production of which the drilling contributed

and appears to contend that inasmuch as it is not the owner or operator of the wells drilled nor even a member of the oil producing, refining, or distributing industry, it is not chargeable with knowledge of the interstate character of the product.

The decisive question is whether, at the time of the production—here at the time of petitioner's drilling operations—there were reasonable grounds for petitioner to anticipate that a substantial portion of the production of the wells drilled would move into other States.[16] Although petitioner seeks to avoid a presumption of such anticipation on the ground that "the oil business was not petitioner's business" (Pet. Br. 7),[17] one need not be an oil well operator to be aware that Texas constitutes a principal petroleum reservoir of the Nation. In any event, petitioner was at all times closely identified with the business of

[16] The record shows that all of the 32 wells drilled by respondents, excepting one which produced natural gas, yielded oil. The probability of drilling in the Texas Panhandle area resulting in productive wells is great. Of the 442 wells drilled in that area in 1939, only 33 were dry (approximately 7.5 percent), and of 560 wells drilled in 1940, only 24 were dry (approximately 4 percent). *Petroleum Facts and Figures*, American Petroleum Institute (7th ed. 1941), p. 80; 39 Oil and Gas Journal 52 (Jan. 30, 1941).

[17] Functionally and organizationally drilling for oil is a part of the "oil business" to the same extent that putting in roads in timberland is a part of the lumbering business. Many large oil companies engaged in production maintain their own rotary drilling equipment and crews. See note 4, *supra*.

oil production [18] and could not have been ignorant of the fact that by far the greater portion of the production of Texas fields is shipped out of that State as crude oil or in the form of refined

[18] A claim of ignorance and disinterest similar to that advanced by petitioner here was made in *Fleming* v. *Enterprize Box Co.*, 37 F. Supp. 331 (S. D. A. Fla.), affirmed, 125 F. (2d) 897 (C. C. A. 5), certiorari denied, 62 Sup. Ct. 1312, by a manufacturer of cigar boxes against whom an injunction was sought restraining further violation of the Fair Labor Standards Act. The court pointed out that all of the manufacturer's sales were made to cigar factories in the city of Tampa, Florida, that in excess of 95 percent of the cigars produced in that city were sold outside of the State of Florida, and that the president of the box manufacturing company had for a number of years been engaged as an employee in the cigar factory. On page 334–335 the court stated:

"* * * He, therefore, is presumed to have had more than a general knowledge of the cigar and cigar-box businesses. He must have known that the cigar industry in Tampa for a great many years has been one of the prime industries of Tampa, and that many millions of cigars are manufactured annually in Tampa and sold throughout the greater part of the United States. He must have known that only a small portion of the output of cigars made in Tampa were consumed, or could have been consumed, in the State of Florida. * * * It seems safe to say that one is charged with knowing that which he should have known. It also seems reasonable to conclude that the Act in question cast upon the manufacturer the duty of making some inquiry in order that he might know whether or not he is conducting his business under the law. One could hardly escape a duty imposed upon him by law merely by saying 'I did not know and I made no effort to find out the facts.' Be that as it may, and without deciding the point, the Court is led to conclude from the evidence that the defendant knew when it sold the goods so produced that the same were intended to be shipped, delivered, or sold in interstate commerce."

products.[19] It is not unreasonable to infer that petitioner was also intimately acquainted with the marketing arrangements prevailing in the fields: that oil from a particular well is commingled in the course of transportation via pipe line in Texas with the products of other wells, so that a separate identity of the comparatively small portion destined for ultimate consumption in Texas is not preserved. Unless petitioner had some familiarity with unusual marketing arrangements made by the operators for whom it drilled wells—a familiarity which it is prompt to deny—it must have anticipated that the oil which it helped to produce would be distributed,

[19] In *St. John* v. *Brown*, 38 F. Supp. 385, 388 (N. D. Tex.), the court said: "They [the employers] must be held to know that which is of such common knowledge that the courts may take judicial knowledge of it, viz., that the greater percentage of all crude oil produced in Texas, certainly such as finds its way into major pipe lines, goes out of our State, though it may be in the form of by-products, for ultimate consumption."

During 1939, some 33 percent of all crude oil produced in Texas was sent to refineries in other States or foreign countries. Bureau of Mines, *Crude Petroleum and Petroleum Products Review of 1939* (1940), p. 37. About 84 percent of Texas refined gasoline was shipped out of Texas during that year (*ibid.*, p. 65). Some 91 percent of Texas refined kerosene was shipped out of Texas during 1938 (*ibid.*, pp. 46, 68). About 71 percent of Texas refined gas oil and fuel oils was shipped out of Texas during 1938 (*ibid.*, pp. 46, 77). Gas, kerosene, gas oil, and fuel oil comprised approximately 91 percent of total national petroleum products in that year (*ibid.*, p. 46).

refined, and disposed of in accordance with the familiar arrangements characterizing the industry as a whole. The pipe-line connections at the wells drilled by petitioner (see *supra*, p. 3) conclusively negative any indication that the wells occupied any special position in the productive and distributive scheme.[20] One cannot "shut his eyes or his ears to the inlet of information" (*Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417, 437) and escape Federal regulation on the basis of disingenuousness or naivete.

The Administrator's interest in the question whether petitioner has sufficiently proved that the production in which it was engaged was "for commerce" arises from his concern with continued maintenance of Section 16 (b) as an effective instrument for enforcement of the Act. Both of the courts below were satisfied that respondents had amply sustained their burden of proof (R. 140–141, 160–161). It would serve no good purpose for this Court to reverse the judgment below and remand the cause for proof of facts which are matters of common knowledge.

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[20] These pipe lines, which ran into other States, included lines owned by petroleum companies which market their product on a national and international scale. Included on the list of pipe-line connections (R. 14–22, 85) are The Texas Company, Stanolind Oil & Gas Co. (a subsidiary of Standard Oil Co. of Indiana), Sinclair Prairie Oil Co., and Sunray Oil Company.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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OCTOBER 1942.

APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201 et seq.):

SEC. 3. As used in this Act—* * *

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

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SUPREME COURT OF THE UNITED STATES.

No. 21.—October Term, 1942.

Warren-Bradshaw Drilling Company, *vs.* O. V. Hall, Individually and as Agent of W. N. Slaid, et al. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[November 9, 1942.]

Mr. Justice Murphy delivered the opinion of the Court.

We are concerned here, as in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, with a problem of statutory delineation, not constitutional power, in the application of the Fair Labor Standards Act[1] to a particular situation. This is an action to recover unpaid overtime compensation and an equal amount as liquidated damages brought by respondent employees under § 16(b). We must decide whether respondents are engaged "in the production of goods for commerce" within the meaning of § 7(a) of the Act. The district court held that they were so engaged, and, since petitioner had failed to compensate them for overtime hours as required by § 7(a), accordingly rendered judgment for each respondent in the appropriate amount.[2] The Circuit Court of Appeals affirmed with an immaterial modification,[3] and the case comes here on certiorari.

The application of the Act depends upon the character of the employees' activities. *Kirschbaum Co.* v. *Walling, supra*, p. 524. The burden was therefore upon respondents to prove that in the course of performing their services for petitioner and without regard to the nature of its business, they were, as its employees, engaged in the production of goods, within the meaning of the Act, and that such production was for interstate commerce. We agree with both courts below that respondents have sustained that burden.

Petitioner is the owner and operator of rotary drilling equipment and machinery, who contracts with the owners or lessees of

[1] 52 Stat. 1060, 29 U. S. C. § 201 *et seq.*
[2] 40 F. Supp. 272.
[3] 124 F. 2d 42.

oil lands to drill holes to an agreed-upon depth short of the oil sand stratum. When that depth is reached, the rotary rig is removed, and the machinery and crew move on to other locations. For reasons peculiar to the oil industry, a cable drilling crew then undertakes with cable tools to "bring in" the well or else demonstrate that it is a dry hole. Respondents were employed by petitioner as members of its rotary drilling crew and worked on approximately thirty-two wells in the Panhandle Oil Field of Texas; thirty-one of those wells produced oil, and the other one produced gas. Petitioner was not the owner or lessee of any of the lands on which respondents drilled, and was not shown to have any interest therein or in the oil produced.

In § 3(j) Congress has broadly defined the term, "produced",[4] and has provided that "an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State". Whether or not respondents, in drilling to a specified depth short of oil, may be regarded as engaged in producing or mining, and we certainly are not to be understood as intimating that they may not, recognition of the obvious requires us to hold that at the very least they were engaged in a "process or occupation necessary to the production" of oil. Oil is obtained only by piercing the earth's surface; drilling a well is a necessary part of the productive process to which it is intimately related. The connection between respondents' activities in partially drilling wells and the capture of oil is quite substantial, and those activities certainly bear as "close and immediate tie" to production as did the services of the building maintenance workers held within the Act in *Kirschbaum Co.* v. *Walling*, *ante*, pp. 525-526.

The evidence supports the finding that some of the oil produced ultimately found its way into interstate commerce. All the wells had pipeline connections, some of them being with petroleum companies operating on a national scale, wherein the oil was commingled with the production of other wells. Officials of the State of Texas testified that some crude oil is shipped out of the State by these pipelines and that a large percentage of

4 "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State;"

crude oil sent to refineries in Texas thereafter passes out of the State in the form of refined products.

Petitioner contests the applicability of the Act on the ground that it, as an independent contractor not financially interested in the wells, had no intention, expectation or belief that any oil produced would be shipped in interstate commerce, and cites as support *United States* v. *Darby*, 312 U. S. 100, 118, where it was said that the "production for commerce" intended by Congress includes "at least production of goods, which, at the time of production, the employer, according to the normal course of his business, intends or expects to move in interstate commerce although, through the exigencies of the business, all of the goods may not thereafter actually enter interstate commerce". Respondents counter with the proposition that it is enough that the owners of the oil wells expected the oil produced to move across state lines, but the Government does not ask,[5] and there is no need for us to pass upon that proposition. The Act extends at least to the employer who expects goods to move in interstate commerce. *United States* v. *Darby, supra.* Assuming that such expectation, or a reasonable basis therefor, was necessary on petitioner's part before the application of the Act to petitioner, it is here present. The record contains ample indication that there were reasonable grounds for petitioner to anticipate, at the time of drilling, that oil produced by the wells drilled, would move into other states. Petitioner, closely identified as it is with the business of oil production, cannot escape the impact of the Act by a transparent claim of ignorance of the interstate character of the Texas oil industry. *St. John* v. *Brown*, 38 F. Supp. 385, 388; cf. *Fleming* v. *Enterprise Box Co.*, 37 F. Supp. 331, 334-335, affirmed, 125 F. 2d 897.

One final contention merits but slight consideration. Respondents were employed on the basis of an eight hour day and regularly worked seven days a week, receiving fixed wages ranging from $6.50 to $11 per day. There was no agreement providing for an hourly rate of pay or that the weekly salary included additional compensation for overtime hours. Petitioner urges that it complied with the overtime compensation requirements of the Act because respondents received wages in excess of the statu-

[5] The Solicitor General submitted a brief on behalf of the Administrator of the Wage and Hour Division, United States Department of Labor, as amicus curiae.

tory minimum wage, including time and one-half of that minimum wage for all overtime hours, which wages respondents impliedly agreed included overtime compensation by accepting them. A similar argument was squarely rejected in *Overnight Motor Co.* v. *Missel*, 316 U. S. 572.

Affirmed.

Mr. Justice ROBERTS.

I dissent, as I did in *Kirschbaum* v. *Walling*, 316 U. S. 517, and for the same reason. But I think the present a more extravagant application of the statute than that there approved. We may assume that Congress, in drafting the Act, had in mind the practical, as distinguished from a theoretical, distinction between what is national and what is local,—between what, in fact, touches interstate commerce and what, in truth, is intrastate.

The phrases on which respondent relies are these: An employee "who is engaged in [interstate] commerce or in the production of goods for [interstate] commerce." . . . (§ 7a); and "'Produced' means produced, manufactured, mined, handled or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State." (§ 3j.)

The opinion disavows any thought that the petitioners may be classed as those who mine the oil which passes into commerce; but this seems to be a reservation intended not to preclude such a holding. The Court relies, rather, on the Act's inclusion of anyone employed "in any process or occupation necessary to the production" of goods for commerce.

The reasoning seems to be as follows. The oil will pass into commerce if it is mined. But it cannot be mined unless somebody drills a well. An independent contractor's men do part of the drilling. Their work is "necessary" to the mining and the transportation of the oil. So they fall within the Act.

This is to ignore all practical distinction between what is parochial and what is national. It is but the application to the practical affairs of life of a philosophic and impractical test. It is but to repeat, in another form, the old story of the pebble thrown into the pool, and the theoretically infinite extent of the resulting waves, albeit too tiny to be seen or felt by the exercise of one's senses.

The labor of the man who made the tools which drilled the well, that of the sawyer who cut the wood incidentally used, that of him who mined the iron of which the tools were made, are all just as necessary to the ultimate extraction of oil as the labor of ~~petitioners~~. Each is an antecedent of the consequent,—the production of the goods for commerce. Indeed, if ~~petitioners~~ were not fed, they could not have drilled the well, and the oil would not have gone into commerce. Is the cook's work "necessary" to the production of the oil, and within the Act?

I think Congress could not and did not intend to exert its granted power over interstate commerce upon what in practice and common understanding is purely local activity, on the pretext that everything everybody does is a contributing cause to the existence of commerce between the states, and in that sense necessary to its existence.